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No. 95-_____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

ENRIQUE RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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43 pp

QUESTION PRESENTED

Whether the Court of Appeals erroneously expanded the holding of *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), which allows police officers to order automobile drivers out of their vehicles during traffic stops, to automobile passengers, where there is no suspicion of criminal activity other than an alleged minor traffic violation by the driver?

LIST OF PARTIES

Petitioner Enrique Ruvalcaba was plaintiff and appellant in the courts below. Respondents City of Los Angeles, Daryl F. Gates, John Schiffner, David Jacoby and John Backus were the defendants and respondents in the courts below.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

ENRIQUE RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents.

Petitioner Enrique Ruvalcaba respectfully prays that a writ of certiorari issue to review the judgment of the trial court entered October 6, 1993, and the opinion of the United States Court of Appeals for the Ninth Circuit, filed on August 29, 1995, affirming that judgment.

OPINION BELOW

The decision of the Court of Appeals was reported at 64 F.3d 1323, and is attached hereto as Appendix A. No opinion was rendered by the District Court for the Central District of California. The judgment of the district court appears as Appendix B.

JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit affirming the judgment was filed on August 29, 1995. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 3, 1995. Appendix C. This petition for certiorari was filed February 1, 1996, 90 days within November 3, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Proceedings Below

Enrique Ruvalcaba filed a 42 U.S.C. § 1983 action against the City of Los Angeles, its former Chief of Police Daryl F. Gates, and three Los Angeles Police Department (LAPD) officers for money damages based on allegations of excessive force and false arrest. Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(3) (civil rights). The trial court bifurcated Mr. Ruvalcaba's claims against the City and former Chief Gates from his claims against the individual officers, and then conducted a five-day jury trial on the issue of the officers' liability. Following a defense verdict, the trial court entered judgment in favor of all defendants. Mr. Ruvalcaba appealed. The Ninth Circuit affirmed.

2. Statement of Facts

The essential facts are not in dispute. During the early morning hours of February 28, 1991, petitioner Enrique Ruvalcaba and his friend Salvador Haro were riding in a car driven by petitioner's brother Victor Ruvalcaba. Two LAPD officers, David Jacoby and John Backus, pulled Victor Ruvalcaba over because of a supposed failure to stop for a posted stop sign. Before the stop, the officers had no information that the car or any of the men in it were involved in any crime. Moreover, the officers had determined the vehicle had not been reported stolen.

The officers ordered the men out of the car for a pat down search. All three complied, but once petitioner was outside, an altercation ensued. The officers struck petitioner with their billy clubs, injuring his arm and leaving a large gash in his forehead. A backup officer who arrived after the fight sent a computer message stating: "Arrestee knocked unconscious with gaping head wound . . . Routine."

After spending more than two months in jail awaiting trial, petitioner pled nolo contendere to a violation of Section 2800 of the California Vehicle Code, failure to obey a lawful order, and was released. Meanwhile, the driver, Victor Ruvalcaba, was never ticketed for the supposed traffic offense.

REASON FOR GRANTING THE WRIT

The Court Should Decide Whether the Fourth Amendment Allows Police Officers to Order Passengers Out of Cars Whenever the Driver Is Detained for a Routine Traffic Citation.

1. The Conflict in the Lower Courts.

In its opinion below, *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995), the Ninth Circuit Court of Appeals rejected petitioner's argument that the officers ordering him from the car violated his Fourth-Amendment right to be free from a suspicionless seizure. By a 2-1 vote, it held—for the first time by any federal appellate court—that automobile *passengers* can be ordered out without any individualized suspicion or need whenever the *driver* is detained for a traffic stop, no matter what the circumstances or how trivial the driver's alleged infraction.[1]

This Court held in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (per curiam), that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the *driver* to get out of the vehicle without violating the Fourth Amendment[]." *Id.*, at 111 n.6, 98 S.Ct. at 333 n.6

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[1]Judge James M. Burns' separate opinion is labeled a "Partial Concurrence and Partial Dissent." He disagreed expressly, however, with the question presented, writing that he did "not concur with the majority's establishment of a bright-line rule that permits an officer to routinely order all occupants to exit a vehicle legally stopped for a traffic violation." 64 F.3d at 1329.

(emphasis added). The Ninth Circuit expanded that ruling: "Wh0ile we agree with Ruvalcaba that *Mimms* does not control the outcome, we believe that the reasoning behind *Mimms* is equally applicable to passengers in a vehicle as it is to drivers." 64 F.3d at 1327 (footnote omitted).

The day following the filing of the Ninth Circuit opinion in *Ruvalcaba*, the Court of Special Appeals of Maryland issued a remarkably scholarly opinion surveying most of the existing precedent and carefully balancing the competing interests involved on this same question. *State v. Wilson*, 106 Md.App. 24, 664 A.2d 1 (1995), *cert. denied* 340 Md. 502, 667 A.2d 342 (1995). It rejected the contention that drivers and passengers should be treated alike, and concluded that *Mimms* should not be extended to passengers.

The split between *Ruvalcaba* and *Wilson* mirrors the sharp conflict which already existed among the state courts, with many decisions by courts of last resort on each side of the question—often with passionate dissents. In addition to Maryland, the following states reject the view that *Mimms* applies to passengers: California, *People v. Maxwell*, 206 Cal.App.3d 1004, 1008-10, 254 Cal.Rptr. 124, 126-28 (1988)[2]; Iowa, *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990) ("Further intrusion on the passenger is not justified . . . unless some articulable suspicion exists concerning a violation of law by that person, or unless further interference with the passenger is required to facilitate a lawful arrest of another person or lawful search of the vehicle."); New Jersey, *State v. Smith*, 134 N.J. 599, 616, 637 A.2d 158, 166 (1994) ("[T]he scale tips against a per se rule that a passenger may always be ordered out."); Pennsylvania, *Commonwealth v. Elliott*, 376 Pa.Super. 536, 549, 546 A.2d 654, 660 (1988); Tennessee, *Johnson v. Tennessee*, 601 S.W.2d 326, 328 (Tenn. App. 1980) ("The police

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[2]In addition, California holds an order *prohibiting* a passenger from leaving the car during a traffic stop to be a detention requiring individualized suspicion. *People v. Gonzalez*, 7 Cal.App.4th 381, 8 Cal.Rptr.2d 640 (1992).

officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries."); Utah, *State v. Schlosser*, 774 P.2d 1132, 1135 n. 3 (Utah 1989) (dicta); and Virginia, *Bethea v. Commonwealth*, 245 Va. 416, 419, 429 S.E.2d 211, 213 (1993) (declining to extend *Mimms* given facts presented).

The states extending *Mimms* to passengers include Florida, *Doctor v. State*, 573 So.2d 157, 159 (Fla. 1991); Illinois, *People v. Salvator*, 236 Ill. App. 3d 824, 840, 602 N.E.2d 953, 963 (Ill. App. 1992), *appeal denied* 148 Ill.2d 651, 610 N.E.2d 1273 (1993); Indiana, *Warr v. State*, 580 N.E.2d 265, 267, (Ind. App. 1991); Michigan, *People v. Martinez*, 187 Mich.App.160, 167, 466 N.W.2d 380, 383 (1991) (2-1 decision), *vacated* 439 Mich. 986, 483 N.W.2d 868 (1992); Minnesota, *State v. Ferrise*, 269 N.W.2d 888, 890 (Minn. 1978) (three-judge dissent); North Dakota, *State v. Gilberts*, 497 N.W.2d 93, 96 (N.D. 1993) (passenger ordered out incident to *arrest* of driver); and Rhode Island, *State v. Soares* 648 A.2d 804, 806 (R.I. 1994). After first skirting the issue in *People v. McLaurin*, 70 N.Y.2d 779, 781, 515 N.E.2d 904, 905, 521 N.Y.S.2d 218, 219-20 (1987), New York extended *Mimms* to passengers over the vigorous dissent of three judges. *People v. Robinson*, 74 N.Y.2d 773, 543 N.E.2d 733, 545 N.Y.S.2d 90, *cert. denied* 493 U.S. 966, 110 S.Ct. 411, 107 L.Ed.2d 376 (1989).[3] Louisiana's high court initially refused to extend *Mimms* to passengers, *State v. Williams*, 366 So.2d 1369, 1374 (La. 1978), but then overruled itself over the dissent of two judges. *State v. Landry*,

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[3]According to the *Robinson* dissent,

> Although the [United States] Supreme Court has not, to date, pronounced so total an evisceration of the Fourth Amendment's protections against warrantless searches and seizures, the majority of this court sweeps away entirely those protections in respect to the occupants of a lawfully stopped vehicle, proclaiming that the seizure of such occupants is per se reasonable based upon the risks inherent in "police/civilian vehicle encounters."

74 N.Y.2d at 776, 543 N.E.2d at 734, 545 N.Y.S.2d at 91.

588 So.2d 345 (La. 1991).

The issue obviously is of great importance; its resolution affects the privacy rights of everyone who travels by motor vehicle. At present, the Fourth-Amendment rights of an auto passenger on a cross-country trip may change at the state line. Accordingly, a writ of certiorari to the Ninth Circuit Court of Appeals should issue pursuant to Sup. Ct. R. 10.1(a)(ii) (conflict with state court of last resort) and *id.* 10.1(c) (important question of federal law which should be settled by Supreme Court).

2. *Pennsylvania v. Mimms* Does Not Apply to Passengers.

While at first blush it might seem nit-picking not to extend *Mimms* to vehicle passengers, a close examination of the *Mimms* rationale shows it only applies to drivers.

Philadephia police officers pulled over Harry Mimms for expired plates and ordered him out of the car. When they noticed a bulge, they patted him down and found a revolver.[4] After noting that the legality of a Fourth-Amendment seizure "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers,'" 434 U.S. at 109, 98 S.Ct. at 330 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)), and finding "the driver was lawfully detained," *id.*, the Court balanced "the incremental intrusion resulting from the request to get out of the car," against "the safety of the officer" and upheld the order to alight. The driver experienced only a "mere inconvenience," not an unwarranted seizure, and the officer could conduct his business from the safety of the roadway's shoulder rather than in a traffic lane.

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[4]The opinion below refers to Harry Mimms as the car's "sole occupant," 64 F.3d at 1326, but he was not. 434 U.S. at 107, 98 S.Ct. at 331. There is no discussion regarding the role of the passenger, if any, in the ensuing events, however.

Commenting on *Mimms* and the distinction between drivers and passengers during traffic stops, Professor Wayne R. LaFave noted that the intermediary appellate decision in that case, which had held the extraction of the *driver* unlawful, was itself based on an opinion, *Commonwealth v. Pollard*, 450 Pa. 138, 299 A.2d 233 (1973), holding the extraction of a *passenger* to be beyond the Pale.

> *Pollard* was correctly decided and ought to be distinguished from *Mimms*. For one thing, it may fairly be said that "an operator's expectation of privacy differs from that of an occupant of a vehicle detained for a traffic violation," as the driver is detained for some violation by him or the car he is driving, while the detention of the passengers is no more than an inevitable incident of the stopping of the car. But more important, the potential danger to police engaged in traffic enforcement could be adequately met if the police allowed passengers to remain in the stopped vehicle and instead had the driver accompany them to the police vehicle while the citation is prepared.

W.R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4 (2d Ed. 1987).

Prior to *Ruvalcaba* there was no federal appellate decision holding that the *Mimms* rule extends to passengers.[5] There has been, however, a certain amount of confusion in the Courts of Appeal generated by imprecise statements of the *Mimms* rule. The Court itself may have contributed to this confusion when it stated, in dicta, that

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[5]There is also no decision of the Court of Appeals holding that officers do not have discretion to order passengers out of cars during routine traffic stops. The sole federal authority other than *Ruvalcaba* squarely addressing the question is a published district court decision holding that the *Mimms* rule applies to passengers too. *United States v. McCoy*, 824 F.Supp 467, 473-74 (D.Del. 1993).

Mimms "held that police may order *persons* out of an automobile during a stop for a traffic violation." *Michigan v. Long*, 463 U.S. 1032, 1047-48, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201 (1983) (emphasis added).[6] *Mimms*, of course, held only that the police may order *drivers* out of an automobile during a stop for a traffic violation.

The *Ruvalcaba* court's claim, 64 F.3d at 1327 n. 3, that the Ninth Circuit "previously noted cursorily that *Mimms* should be extended to apply to '[o]ccupants of a lawfully detained motor vehicle,'" in *United States v. Wiga*, 662 F.2d 1325, 1332-33 (9th Cir. 1981), is incorrect, resting only on language which, the dissent notes, "cursorily and inexactly generalized the *Mimms* holding in dictum." 64 F.3d at 1329. Federal agents were pursuing a felony parole violator driving a motor home. When stopped, and *arrested*,[7] the defendant driver denied there was anyone inside; however, the agents had seen someone enter the vehicle earlier. The denial of the driver's motion to suppress evidence seized during the "protective sweep" of the motor home incident to his felony arrest was affirmed. There was no claim by the passenger that she was improperly ordered out, nor was there any discussion of whether police should be allowed to extract passengers whenever they please. There is only language overstating the *Mimms* holding: "*Occupants* of a lawfully detained motor vehicle may be routinely ordered out of the vehicle." *Id.* at 1332-33 (emphasis added).

The *Ruvalcaba* court's assertion that "[o]ther circuits have extended *Mimms* to apply to passengers in a vehicle," 64 F.3d at 1327 n. 3, is similarly incorrect. Indeed, to the extent the holdings cited bear on the question presented here, they tend to support the contrary

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[6]Justice Powell incorrectly stated in his concurrence to *Rakas v. Illinois*, 439 U.S. 128, 155, 99 S.Ct. 421, 436, 58 L.Ed.2d 387 (1978), that "this Court determined [in *Mimms*] . . . that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made."

[7]Arrests—as opposed to routine vehicle stops to issue traffic cititations—raise issues beyond the scope of the narrow question presented by this petition.

proposition—that the extraction of passengers during routine stops should be based on some sort of individualized suspicion or need, rather than the unbridled discretion of a police officer. For instance, in *United States v. Hardnett*, 804 F.2d 353 (6th Cir. 1986), *cert. denied* 479 U.S. 1097, 107 S.Ct. 1318, 94 L.Ed.2d 171 (1987), the officers were told that four men in the suspect car were armed and threatening someone.

> The Supreme Court has held that . . . "officers may, consistent with the Fourth Amendment . . . require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon." *New York v. Class*, [475 U.S. 106], 106 S.Ct. 960, 967, 89 L.Ed.2d 81 (1986). *See also*, *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). If so, then officers certainly may also order occupants out of a car *when they have a particularized suspicion* that the occupants are armed.

Id. at 358 (emphasis added).[8]

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[8] *United States v. Tellez*, 11 F.3d 530 (5th Cir. 1993), presented a particularized need for the passenger to be removed. Three men were sitting on a front bench seat in a pickup truck. The passenger next to the right-side door was ordered out of the truck so that the officers could view the passenger in the middle. The officers were not attempting to search or investigate the passenger ordered out, but needed to move him so they could confirm whether the middle passenger was a particular parole violator wanted by the police. *See also United States v. Cummins*, 920 F.2d 498, 502 (8th Cir. 1990), *cert. denied* 502 U.S. 962, 112 S.Ct. 428, 116 L.Ed.2d 448 (1991) (order that passenger alight permissible because of suspicious circumstances).

The remaining decisions cited in Footnote 3 of *Ruvalcaba* have nothing to do with ordering passengers out of cars during routine traffic stops. *United States v. Powell*, 929 F.2d 1190 (7th Cir.), *cert. denied* 502 U.S. 981, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991), turned on whether a vehicle owner had standing to challenge a vehicle stop and search at which he was not present. In *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), the officers asked the *driver* "to step to the rear of the vehicle," while the *passenger* "remained in the vehicle." *Id.* at 433.

There is a district court decision arising from within the Ninth Circuit holding that "reasonable precautionary measures to ensure [officer] safety while effecting a routine traffic stop . . . do not include ordering the occupants out of the car at gunpoint and patting them down." *United States v. Daniel*, 804 F. Supp. 1330, 1335 n.10 (D. Nev. 1992). In reaching this conclusion, the court stated the obvious:

> When a police officer effects an automobile stop on the ground that the driver has violated a traffic law, the scope of the resultant detention is strictly limited to the enforcement of that law. . . . An officer conducting a traffic stop may detain the motorist so long as is necessary to check his driver's license and registration, ask a few perfunctory questions, and write out a ticket. Any expansion of the scope of the stop to include investigation of other suspected illegal activity will only be allowed if the officer has a reasonable, articulable suspicion that other criminal activity is afoot.

Id. at 1334 (citations omitted). Following this basic principle here means holding that an officer cannot order a passenger out of a car during a routine traffic stop of the driver, unless there exists some legitimate reason to do so.

3. The Balancing Test: Officer Safety Versus the Intrusion on the Individual

The *Ruvalcaba* court's *only* justification for permitting officers unlimited discretion to order passengers out of cars during routine traffic stops is that concerns for "officer safety" outweigh "this *de minimus* intrusion into a vehicle occupant's liberty." 64 F.3d at 1327. It performs the balance in only the most cursory manner, however, carving out a broad exception to the Fourth Amendment's general requirement of "individualized suspicion" without carefully examining the contents on each side of the scale.

The opinion does not explain how safety is promoted by compelling passengers to get out of cars rather than leaving them inside, other than by suggesting that a "'weapon can be concealed under the seat of a vehicle.'" *Id.* at 1327 (quoting *United States v. Salas*, 879 F.2d 530, 535 (9th Cir.), *cert. denied* 493 U.S. 979, 110 S.Ct. 507, 107 L.Ed.2d 509 (1989). But *Mimms* does not limit its officer safety concerns to shootouts suddenly arising out of innocuous traffic stops; it addresses a much more common, albeit mundane, risk—one applicable only to drivers:

> The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.

Mimms, 434 U.S. at 111, 98 S.Ct. at 333.

The *Ruvalcaba* court asserts that "[h]aving all occupants step out of the vehicle protects the safety of the officer while the officer is dealing with the driver regarding the traffic violation," 64 F.3d at 1327, but there is no evidence in the record—such as the testimony of experts in police tactics—to support this statement, and common sense dictates that would not be so.[9] Traffic stops are often accomplished by a single officer, sometimes two. Cars themselves provide confinement. The passengers will generally be seated in a cramped space facing forward. The officer can order the driver out—pursuant to *Mimms*—and to the rear if he is concerned about a threat from the passengers. Having the passengers outside the car creates additional possibilities for unpleasant confrontations—such as the one which occurred here—and moves them to unsecured positions where they could, if so inclined, more easily create mischief while the officer is distracted by the task at hand, writing a traffic citation for the driver.

The Maryland Court of Special Appeals balanced the competing interests and came to the opposite conclusion.

> A balancing process . . . is an exercise in relativity. A cost-benefit analysis requires that we compare the social "costs" to driver and passenger, respectively, just as we have compared the respective benefits of protecting the officer from each of them. It is here that the parallel [with *Mimms*] falters. It is here that a significantly heavier weight on the "cost" side of the scale in the case of a mere passenger produces, in our judgment, a different result.
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> . . . .

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[9]In his *Mimms* dissent, Justice Stevens called the majority's "assumption about police safety . . . dubious at best," *Mimms*, 434 U.S. at 117, 98 S.Ct. at 337, and quoted law enforcement authorities which instruct officers to try to keep drivers in the car during traffic stops, rather than extracting them. *Id.* at 119 n. 10, 98 S.Ct. at 337 n. 10.

Apparently critical to the Supreme Court's decision that a police officer's prerogative to order a stopped driver out of a car could be automatic rather than conditioned on some showing of particularized suspicion was its conclusion that the social "cost" in terms of interfering with the driver's liberty interest was minimal, if not nugatory. Not only is the automobile itself stopped for a traffic infraction, but the driver is subject to further detention on an in personam basis. The driver is not permitted to walk away from the scene and disappear into the sunset. The driver is required to furnish the officer with evidence of a valid operator's license and valid registration for the vehicle, subject to penalties for failure to do so. The driver is further detained while the officer checks out the identifying data over a police radio. The driver is subject to receiving a traffic ticket or citation, if not, indeed, to custodial arrest for the infraction. All this is well settled law before the *Pennsylvania v. Mimms* considerations even come into play. With the detention of the driver already an undisputed fait accompli, the small incremental intrusion of having him alight from the vehicle while being detained was considered by the Supreme Court to be absolutely de minimis.

. . . .

A police interference with the presumptively unfettered liberty of a mere passenger, by contrast, cannot so easily be dismissed as "de minimis" or as something "hardly ris[ing] to the level of a petty indignity." The passenger has not committed any wrongdoing, even at the level of a traffic infraction. The passenger may not be issued a traffic ticket or

citation, let alone subjected to custodial arrest. The passenger is not required to furnish identification or any other documentation. Once the automobile has slowed down sufficiently for the passenger safely to alight, moreover, the passenger is subject to no mandatory detention whatsoever. The passenger is presumptively free to abandon the driver to the clutches of the law and to hail a cab.

Under the circumstances, a police intrusion on the Fourth Amendment interest of the passenger is not so minimal or merely incremental as to be of no more than slight significance in the weighing operation. To order a passenger to stay in the car or to get out of the car is the imposition of detention per se, and not a mere shift of the location of already established detention.

The interest in officer safety, to be sure, continues to loom large, and this is admittedly a close question. All warrantless activity, however, is presumptively invalid, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Coolidge v. New Hampshire*, 403 U.S. 433, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and the burden is on the State to persuade us that it is reasonable. The State has not persuaded us that the automatic police prerogative, under *Pennsylvania v. Mimms*, to order a driver out of a vehicle should be extended to a passenger—on an automatic basis.

State v. Wilson, 106 Md.App. at 42-44, 664 A.2d at 9-10.

Even though the proliferation of firearms poses an obvious danger to everybody—not just police officers—the Fourth Amendment, through *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny, prohibits discretionary, suspicionless searches of people and places for weapons. In other words, the Fourth-Amendment search and seizure rules should not be different because Enrique Ruvalcaba was seated in a car rather than walking down a sidewalk when the officers detained his brother for an inconsequential infraction. It should be the same. And the rules should be the same rules throughout the United States.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: February 1, 1996

John C. Burton, *Counsel of Record*
BURTON & NORRIS
Attorneys for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ENRIQUE RUVALCABA,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES; DARRYL GATES, Police Chief; JOHN SCHIFFNER; JOHN BACKUS, et al.,
Defendants-Appellees.

No. 93-56609

D.C. No. CV-91-04184-LEW(E)

OPINION

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Submitted* May 1, 1995
Pasadena, California

Filed August 29, 1995

Before: Robert R. Beezer and Stephen S. Trott, Circuit Judges, and James M. Burns, Senior District Judge.**

Opinion by Judge Beezer; Partial Concurrence and Partial Dissent by Judge Burns

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

Individual Rights/Civil Rights/Constitutional Rights

The court of appeals affirmed district court orders. The court held that once a police officer has lawfully stopped a vehicle for a traffic violation, the officer may, consistent with the Fourth Amendment and despite the absence of probable cause or reasonable suspicion of criminal activity, order all of the vehicle's occupants to step outside.

Appellees John Backus and David Jacoby, police officers for appellee the City of Los Angeles, noticed a vehicle fail to stop at a stop sign. Backus recognized one of the three occupants as appellant Enrique Ruvalcaba, with whom Backus had prior contacts. When the officers activated their flashers, the vehicle's driver turned onto a poorly lit side street and stopped. The officers directed the three occupants to step outside and walk over to the sidewalk. The driver and one occupant complied, but Ruvalcaba did not cooperate. Instead, Ruvalcaba jumped out of the vehicle and began swearing at the officers. Ruvalcaba moved toward the officers and a violent struggle ensued. Ruvalcaba was injured.

Ruvalcaba filed a civil rights suit against the officers, the City and others seeking money damages. In the trial of the suit against the individual officers, Ruvalcaba moved for judgment as a matter of law on the ground that the officers illegally seized him when they directed that he exit the vehicle. The district court denied the motion. The jury returned a verdict in favor of the officers. Ruvalcaba moved for a new trial on the ground that the district court erred in permitting Backus and Jacoby to testify about their knowledge of Ruvalcaba's criminal history. The court denied the motion. Ruvalcaba appealed the denial of his two motions.

[1] In *Pennsylvania v. Mimms*, the Supreme Court held that a police officer as a routine practice may order the driver to

step out of a lawfully detained motor vehicle. [2] The reasoning behind *Mimms* is equally applicable to passengers in a vehicle as it is to drivers. [3] The primary basis behind the governmental interest in *Mimms* was the danger to police officers when confronting a driver seated in an automobile. That danger is equally grave when an officer confronts passengers. [4] The intrusion into a passenger's liberty is minimal. The mere order to exit the vehicle is insignificant. [5] The balance of interests in this case weighed heavily in favor of police officers. Once an officer has lawfully stopped a vehicle for a traffic violation, the officer may, consistent with the Fourth Amendment and despite the absence of probable cause or reasonable suspicion of criminal activity, order all of the vehicle's occupants to step outside.

[6] The officers' conduct challenged on appeal in this case was *per se* reasonable. Under the Fourth Amendment, the *de minimis* intrusion into a vehicle occupant's liberty is permitted. [7] Thus, the district court properly denied Ruvalcaba's motion for judgment as a matter of law.

[8] The district court properly allowed Backus and Jacoby to testify about the facts known to them regarding Ruvalcaba's criminal past. [9] Thus, the district court did not abuse its discretion when it denied Ruvalcaba's motion for a new trial.

Senior District Judge Burns concurred in part and dissented in part, disagreeing with the establishment of a bright-line rule permitting an officer to routinely order all occupants to exit a vehicle that is legally stopped for a traffic violation.

COUNSEL

John C. Burton, Burton & Norris, Pasadena, California, for the plaintiff-appellant.

Janet G. Bogigian, Office of the City Attorney, Los Angeles, California, for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the United States Supreme Court held that once a motor vehicle has been lawfully detained for a traffic violation, police officers may order the driver to get out of the vehicle without violating the Fourth Amendment. Today, we must decide whether to extend this holding to cover all passengers in a motor vehicle.

Enrique Ruvalcaba appeals the district court's denial of his motion for a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, and his motion for a new trial pursuant to Federal Rule of Civil Procedure 59. He argues: (1) that police officers conducted an illegal seizure when they ordered him out of a vehicle in which he was a passenger; and (2) that the district court erred in permitting police officers to testify about their knowledge of Ruvalcaba's criminal history.

We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we are persuaded that the Supreme Court's holding in *Mimms* should be extended to passengers, we affirm.

I

Los Angeles Police Officers John Backus and David Jacoby were on duty during the early morning hours of February 28, 1991 when they noticed a vehicle fail to stop at a stop sign.[1] The officers began to follow the vehicle, and Officer

[1]Because the jury returned a verdict in favor of the officers, we accept their version of the events that took place.

Backus recognized one of the three occupants as Enrique Ruvalcaba. Officer Backus was familiar with Ruvalcaba from a variety of prior contacts. Due to this familiarity, he anticipated the possibility of danger in stopping the vehicle.

When the officers activated their flashers, the driver of the vehicle turned onto a poorly lit side street and stopped. The officers approached the vehicle cautiously and directed the three occupants to step outside and walk over to the sidewalk. The driver, who turned out to be Enrique Ruvalcaba's brother, Victor, complied with the officers' direction as did another occupant of the vehicle, Salvador Haro.

Enrique Ruvalcaba did not cooperate. Instead, he jumped out of the vehicle and began swearing at the officers. Ruvalcaba then moved toward the officers in a threatening manner.[2] Officers Jacoby and Backus proceeded to subdue Ruvalcaba by using their batons. A violent struggle ensued, and Ruvalcaba suffered injuries.

Ruvalcaba filed a civil rights suit under 42 U.S.C. § 1983 against Officers Backus and Jacoby, Officer John Schiffner, the City of Los Angeles, and Police Chief Darryl F. Gates (collectively "City"), seeking money damages. The trial was bifurcated, and Ruvalcaba's suit against the individual officers proceeded to trial first. Ruvalcaba moved for judgment as a matter of law on grounds that the police officers illegally seized him when they directed that he exit the vehicle. The district court denied the motion.

The jury returned a verdict in favor of the officers. Ruvalcaba then moved for a new trial on grounds that the district court erred in permitting Officers Backus and Jacoby to testify about their knowledge of Ruvalcaba's criminal history. The district court denied this motion as well.

[2]For the sake of clarity, Ruvalcaba will hereinafter refer to Enrique Ruvalcaba.

II

We review de novo the district court's denial of a motion for judgment as a matter of law. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992). We review for abuse of discretion a district court's denial of a motion for a new trial. *Larson v. Neimi*, 9 F.3d 1397, 1398 (9th Cir. 1993).

III

Ruvalcaba first argues that the district court erred in denying his motion for judgment as a matter of law. He contends that the police officers violated his rights under the Fourth Amendment when they, without cause, ordered him to step out of the vehicle in which he was riding as a passenger. Because this seizure was illegal as a matter of law, Ruvalcaba argues, no reasonable juror could have returned a verdict in favor of the officers.

At the outset, it is important to note what is not at issue in this case. Ruvalcaba does not contest on appeal the legality of the routine traffic stop. We therefore need not examine the reasons for which Officers Jacoby and Backus stopped the Ruvalcaba vehicle. Ruvalcaba also raises no challenge to the reasonableness of the police officers' use of force after he stepped out of the vehicle. As the jury has already done so, we need not pass judgment on those events. Finally, Ruvalcaba does not argue that the police officers conducted any unconstitutional pat-down search or frisk after he left the vehicle. The issue Ruvalcaba does raise directly is whether Officers Jacoby and Backus violated the Fourth Amendment when they ordered him to step out of the vehicle.

The Fourth and Fourteenth Amendments to the United States Constitution prohibit state officials from conducting unreasonable searches and seizures. *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386 (1995). When a police officer stops an

automobile and detains its occupants, that activity constitutes a "seizure" within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

Not all seizures, of course, violate the Fourth Amendment, only those that are unreasonable. *Vernonia*, 115 S. Ct. at 2390; *see United States v. Barona*, 56 F.3d 1087, 1091-93 n.1 (9th Cir. 1995) ("Reasonableness, not probable cause, is undoubtedly the touchstone of the Fourth Amendment."). Reasonableness is measured by balancing the nature of the intrusion into an individual's Fourth Amendment interests against "the public interest" or "legitimate governmental interests" at stake. *Vernonia*, 115 S. Ct. at 2390; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

In determining the reasonableness of a police officer's order for an occupant to get out of a vehicle after a valid traffic stop, we do not write on a blank slate. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the Supreme Court confronted a similar case involving a police officer's traffic stop of a vehicle and its driver, the sole occupant. The Court framed the inquiry as whether "the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment." *Id.* at 109. To answer its question, the Court focused on "the incremental intrusion resulting from the request to get out of the car." *Id.*

The Court first examined the public interest. Initially, the Court made clear that the police officer had no reason to suspect "foul play" from the particular driver, "there having been nothing unusual or suspicious about his behavior." *Id.* Rather, the police officer's routine practice was to order all drivers out of their vehicles after traffic stops. The Court held nevertheless that the state's interest in protecting officer safety was "both legitimate and weighty" and that this interest was enhanced by the officer's practice. *Id.* at 110. The Court rec-

ognized "the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id.*

Balanced against the state's interest, the Court weighed the intrusion into a driver's personal liberty of the order to step out of the vehicle after the vehicle had already been validly stopped for a traffic infraction. The Court concluded that the additional intrusion "can only be described as *de minimis*." *Id.* at 111. Later, the Court found additional ways to characterize the intrusion, including "hardly ris[ing] to the level of a 'petty indignity,' " and "a mere inconvenience." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 17 (1968)).

[1] The Court concluded that the public interest in officer safety prevailed, holding that a police officer as a routine practice may order the driver to step out of a lawfully detained motor vehicle.

[2] Ruvalcaba contends that his situation is distinguishable from *Mimms* because he was a passenger in the vehicle, whereas Mimms was the driver. Ruvalcaba argues that "passengers have done no wrong, violated no laws, and there is no basis to deprive them of their liberty." While we agree with Ruvalcaba that *Mimms* does not control the outcome, we believe that the reasoning behind *Mimms* is equally applicable to passengers in a vehicle as it is to drivers.[3]

[3]We have previously noted cursorily that *Mimms* should be extended to apply to "[o]ccupants of a lawfully detained motor vehicle," but we did so without any balancing of interests of passengers. *See United States v. Wiga*, 662 F.2d 1325, 1332-33 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982). *Wiga* is, of course, entirely consistent with the result we reach here.

Other circuits have extended *Mimms* to apply to passengers in a vehicle, most without significant analysis. *See United States v. Shabazz*, 993 F.2d 431, 437 n.7 (5th Cir. 1993); *United States v. Hardnett*, 804 F.2d 353, 358 (6th Cir. 1986), *cert. denied*, 479 U.S. 1097 (1987); *cf. United States v. Tellez*, 11 F.3d 530, 533 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1630 (1994); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.), *cert. denied*, 502 U.S. 981 (1991).

[3] The primary basis behind the legitimate and weighty governmental interest in *Mimms* was the danger to police officers when confronting a driver seated in an automobile. *See Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972) ("According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile."); *cf. Michigan v. Long*, 463 U.S. 1032, 1047 (1983) ("[I]nvestigative detentions involving suspects in vehicles are especially fraught with danger to police officers."). That danger is equally grave when a police officer confronts passengers; indeed, it may be more dangerous to have the driver outside the vehicle while one or more other passengers are left inside. One or more passengers may be seated in the back seat of a car, or the back of a sport utility vehicle, making it difficult, if not impossible, for the officer to keep a close watch on these passengers. *See United States v. Salas*, 879 F.2d 530, 535 (9th Cir.), *cert. denied*, 493 U.S. 979 (1989) ("A weapon can be concealed under the seat of a vehicle. It is readily accessible to be used to harm any police officer who approaches an automobile . . . ."). Having all occupants step out of the vehicle protects the safety of the officer while the officer is dealing with the driver regarding the traffic violation. We believe that the governmental interest weighs strongly in favor of permitting a police officer to order all occupants out of a vehicle.

[4] The intrusion into a passenger's liberty is minimal. The automobile has been stopped lawfully, and the passenger is, for the time being, going nowhere. As with the driver, "the only question is whether he shall spend that period sitting [in the car] or standing alongside it." *Mimms*, 434 U.S. at 111.

Two state courts have reached the same conclusion, after conducting careful and well-reasoned balancing of the interests at stake for passengers. *Michigan v. Martinez*, 466 N.W.2d 380, 383-84 (Mich. Ct. App. 1991), *appeal dismissed*, 480 N.W.2d 106 (Mich. 1992); *Louisiana v. Landry*, 588 So. 2d 345, 346-47 (La. 1991).

The passenger is not asked to expose any more of his person than is already exposed by virtue of being in the vehicle during the traffic stop. Of course, no additional intrusion into the passenger's liberty, such as a frisk or prolonged detention, may be justified by the traffic stop absent some additional suspicion. The mere order to exit the vehicle, however, is insignificant.

[5] The balance of interests in this case weighs heavily in favor of police officers. In the area of police confrontations with occupants of legally stopped vehicles, wide deference is appropriately granted to the officers' need for protection, especially when the intrusion is so minimal. We hold that once a police officer has lawfully stopped a vehicle for a traffic violation, the officer may, consistent with the Fourth Amendment and despite the absence of probable cause or reasonable suspicion of criminal activity, order all occupants of the vehicle to step outside.

Although we recognize that the driver, not the passengers, was the cause of the traffic stop, that fact does not alter the balance of interests. The weighty interest in officer safety is not dependent on the danger from the driver as a result of being stopped for a traffic violation, it is dependent on the inherent danger from approaching seated people in a vehicle, whether driver or passenger. Justice Stevens, dissenting in *Mimms*, recognized this logic. *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting) ("Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger.").

[6] Because we conclude that it is reasonable under the Fourth Amendment for police officers to direct all occupants of a vehicle to step out of their vehicle following a valid traffic stop, the officers' conduct challenged on appeal in this case was *per se* reasonable. We need not address the City's argument that Officers Backus and Jacoby had compelling reasons in this case to order Ruvalcaba out of the vehicle.

Indeed, the circumstances would have alarmed any officer: it was late at night, the Ruvalcaba car pulled onto a side street before stopping, and Officers Backus and Jacoby knew about some criminal history of at least one occupant. Whether, as in this case, police officers are confronted with multiple factors indicating danger, or whether the situation appears normal and benign, the Fourth Amendment permits this *de minimis* intrusion into a vehicle occupant's liberty.[4]

[7] The district court properly denied Ruvalcaba's motion for judgment as a matter of law.

IV

Ruvalcaba also argues that the district court erred in denying his motion for a new trial. He contends that Officers Backus and Jacoby were improperly permitted to testify about their knowledge of Ruvalcaba's criminal history. We disagree.

District courts are granted broad discretion in admitting evidence, and their rulings are reviewed only for an abuse of discretion. *United States v. Dunn*, 946 F.2d 615, 617 (9th Cir.), *cert. denied*, 502 U.S. 950 (1991). A new trial is only warranted when an erroneous evidentiary ruling "substantially prejudiced" a party. *United States v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992).

The district court permitted the police officers to testify in a limited manner about their prior contacts with Ruvalcaba. This testimony was relevant to establish the facts and circumstances known to the officers during their confrontation with Ruvalcaba. In addressing an excessive force case under the Fourth Amendment, "the question is whether the officers'

[4]Police officers are, of course, not required to take this protective step. We merely hold that such a routine practice is permissible under the Fourth Amendment.

actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

[8] Keeping in mind that this trial involved the officers' alleged use of excessive force during the entire confrontation with Ruvalcaba, we conclude that the district court properly allowed the officers to testify about the facts known to them regarding Enrique Ruvalcaba's criminal past. The district court also properly admonished the jury to consider Ruvalcaba's prior bad conduct only in determining whether the officers' actions were reasonable under the circumstances. There was no abuse of discretion in admitting this evidence.

Neither did the district court's admission of the evidence run afoul of Federal Rule of Evidence 403. The district court is accorded broad discretion in determining whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Borunda v. Richmond*, 885 F.2d 1384, 1388 (9th Cir. 1988). The police officers' testimony was not so unfairly prejudicial as to warrant exclusion under Rule 403.

[9] The district court did not abuse its discretion in denying Ruvalcaba's motion for a new trial.

AFFIRMED.

BURNS, Senior District Judge, CONCURRING in Part and DISSENTING in Part:

Although I agree that the district court's denial of Ruvalcaba's motion for judgment as a matter of law and motion for new trial was proper under the circumstances particular to this case, I do not concur with the majority's establishment of a

bright-line rule that permits an officer to routinely order all occupants to exit a vehicle legally stopped for a traffic violation.

As the majority states, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Supreme Court held that an officer may routinely ask the driver to exit a vehicle lawfully stopped for a traffic violation because the officer's safety is always a matter of concern under those circumstances. The *Mimms* Court weighed the public's interest in allowing an officer to take precautionary safety measures when he confronts a driver for a traffic violation against "the individual's right to personal security free from arbitrary interference by law officers." *Id.* at 109. The Court concluded the officer's safety takes precedence under these circumstances because the additional intrusion is *de minimis* when an officer asks the driver, a person already lawfully detained because he violated a law, to exit a lawfully stopped vehicle.

The Court did not, however, generalize its holding to embrace all occupants of a vehicle. In fact, the Court's reasoning was geared directly and specifically to the inherent and potential risk arising from the interaction between an officer and a driver during a stop for a traffic violation:

(1) "[W]e . . . recognize[ ] the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id.* at 110.

(2) "Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements . . . ." *Id.*

(3) "The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations." *Id.* at 111.

(4) "Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the

driver of the vehicle to step out of the car and onto the shoulder of the road where the inquiry may be pursued with greater safety to both." *Id.*

The *Mimms* Court, in essence, concluded that an officer's safety is *per se* at risk during a traffic stop even though the driver's offense may be minor because of (1) the physical juxtaposition of officer, driver, car, and passing traffic; and (2) the confrontation that inevitably takes place between a driver and an officer during a traffic stop. These factors, however, may not necessarily exist in relation to other occupants of the vehicle; thus, the blanket balancing test the *Mimms* Court performed to establish a *per se* rule permitting an officer to routinely ask the driver to exit a vehicle lawfully stopped for a traffic violation may not fit well when "passenger" is substituted for "driver." A passenger, for example, may well be detained inadvertently and unavoidably during a routine stop for a traffic violation. Unlike the driver, who "owns" the unlawful conduct, the passenger may have done no more than unluckily place himself in the hands of a negligent driver. The passenger does not become an active participant in the stop unless criminal activity is suspected; thus, a passenger is not routinely approached nor confronted face-to-face by the officer. Also, the officer's exposure to "the hazard of accidental injury from passing traffic" during a traffic stop is not a risk associated with a passenger since traffic generally passes on the driver's side.

Just as the *Mimms* Court did not extend its *per se* rule to encompass all occupants of a vehicle, neither has the Ninth Circuit until now. In the past, this Circuit, like others, has only cursorily and inexactly generalized the *Mimms* holding in dictum. *See, e.g., United States v. Wiga*, 662 F.2d 1325, 1332-33 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982) ("Occupants of a lawfully detained motor vehicle may be routinely ordered out of the vehicle" pursuant to *Mimms*); *United States v. Shabazz*, 993 F.2d 431, 437 n.7 (5th Cir. 1993) ("Ordering someone to get out of a car is itself a 'seizure,' but

a constitutionally permissible one when done incident to a lawful traffic stop" pursuant to the ruling in *Mimms*); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.) (The occupants of a car lawfully stopped for a traffic violation "may even be asked to leave their vehicles."), *cert. denied*, 502 U.S. 981 (1991).[1] Our prior decisions, however, are compatible with the view that an officer may ask passengers as well as drivers to exit vehicles lawfully stopped for routine traffic violations for the limited purpose of ensuring an officer's safety. *See, e.g., United States v. Cannon*, 29 F.3d 472, 476-77 (9th Cir. 1994) (An officer can take reasonable protective measures such as ordering the driver to get out of the car as the particular circumstances warrant upon lawfully stopping a vehicle for a traffic violation.); *United States v. Behanna*, 814 F.2d 1318, 1321 (9th Cir. 1987) (Although the vehicle was stationary, we held the officer's precautionary action of requesting the occupants to get out of the car was reasonable when the officers found two persons asleep in a vehicle bearing an expired license plate and the person in the passenger seat had a record of concealed weapon charges).

Although "the safety of the officer . . . is both legitimate and weighty," *Mimms*, 434 U.S. at 110, it is unreasonable for an officer to have discretion without limits. I would hold, therefore, that an officer may ask passengers to exit a vehicle if the vehicle has been lawfully stopped for a traffic violation and if the officer's request is legitimate and reasonable for the limited purpose of ensuring the officer's safety under the circumstances. Subjecting an officer's conduct to this minimal

[1]In addition to relying on the dicta in these cases, the majority also cites to *United States v. Tellez*, 11 F.3d 530 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1630 (1994), and *United States v. Hardnett*, 804 F.2d 353 (6th Cir. 1986), *cert. denied*, 479 U.S. 1097 (1987). In *Tellez*, however, the court stated "the police can generally order a *suspect* out of a car after a routine traffic stop." 11 F.3d at 533 (emphasis added). In *Hardnett*, the court found that "officers . . . may also order occupants out of a car *when they have a particularized suspicion that the occupants are armed.*" 804 F.2d at 358 (emphasis added).

test of reasonableness is a minor burden compared to the import of virtually eradicating a passenger's Fourth Amendment right to freedom from "arbitrary interference by law officers." In effect, application of the majority's *per se* rule to passengers unnecessarily does away with the Fourth Amendment rights of persons who may be merely along for the ride, so to speak.

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APPENDIX B—UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
JUDGMENT ON VERDICT
FILED ON OCTOBER 4, 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 93-56609
D.C. No. CV-91-04184-LEW(E)

ENRIQUE RUVALCABA,

Plaintiff,

v.

CITY OF LOS ANGELES; et al.,

Defendants.

This action came on for trial before the Court, Honorable E. Laughlin Waters, District Judge, presiding. The case was trifurcated with liability tried first. The issues having been duly tried, and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants, CITY OF LOS ANGELES, DARYL F. GATES, JOHN SCHIFFNER, JOHN BACKUS, DAVID JACOBY, THOMAS WILLIAM NOLAN and THOMAS CASPER, recover of the plaintiff, ENRIQUE RUVALCABA, their costs of action.

DATED: 10/4/93

JUDGE LAUGHLIN E. WATERS

APPENDIX C—NINTH CIRCUIT COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING FILED NOVEMBER 3, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-56609
D.C. No. CV-91-04184-LEW(E)

ENRIQUE RUVALCABA,

Plaintiff-Appellant,

v.

CITY OF LOS ANGELES; DARRYL GATES, Police Chief; JOHN SCHIFFNER; JOHN BACKUS, et al.,

Defendants-Appellees.

Before: BEEZER and TROTT, Circuit Judges, BURNS, Senior District Judge.*

A majority of the panel has voted to deny the petition for rehearing. Judges Beezer and Trott vote to reject the suggestion for rehearing en banc and Judge Burns recommends accepting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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*The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.